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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958.

No. 328

[illegible]SSION WELLS,

Petitioner,

vs.

[illegible]E OF CALIFORNIA,

APPENDIX "C" TO PETITION FOR CERTIORARI.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958.
No.....

EDWARD SIMON WEIN,

Petitioner,

vs.

STATE OF CALIFORNIA.

APPENDIX "C" TO PETITION FOR CERTIORARI.

To the Chief Justice and Justices of the Supreme Court of the United States:

Comes now defendant-petitioner, Edward Simon Wein, and respectfully files this Appendix "C" to the Petition for Certiorari, containing excerpts from the statements and argument of the prosecutor of which we complain.

Misconduct Quotes From the Record.

1. The prosecutor said to one of prospective jurors during *voir dire* examination:

> "Now, to get back to this case. Do any of you have any quarrel with the law of this State that says a person who offends kidnapping for the purpose of robbery with bodily injury, in other words, there is no killing, no murder—murder is the usually accepted offense for which the greater penalty of death is used in our penal system throughout the United States and other countries—but in many

other countries and many other states they do have certain offenses wherein capital punishment is considered one of the punishments, though there has not been, the defendant is not charged and has committed no murder.

"Now, that is this very situation here. In other words, so that we may be clear, there is no charge against this defendant of having killed or murdered anyone. He is charged with five possible capital offenses, which is kidnapping for the purpose of robbery, wherein if you find the victims did suffer bodily harm, then you as jurors in your sound and absolute discretion will be faced with the duty of determining whether, all things considered, all the evidence in the case, whether the greater penalty of death is the proper penalty in the case or whether life imprisonment without the possibility of parole is what the punishment should be." [R. Folder I. R. T. Vol. I, p. 116.]

2. Further, in questioning the jury on *voir dire*, the prosecutor said:

"I assume you will all follow that instruction of the Court if the Court gives it to you. Now when you get to the question of penalty will you be willing to take into consideration in determining from all the evidence in the case, within your sound and absolute discretion, as to whether the penalty should be the death penalty as against life imprisonment; that if you should impose life imprisonment without the possibility of parole that doesn't mean necessarily the defendant would have to serve the remainder of his life in prison without parole because there is always the possibility of a pardon from the Governor, a commutation of his sentence to time served, and a possibility of a 'change' in the parole laws. In other words, maybe five, ten, fifteen

years from now, when I am gone or at least a has been among prosecutors, when you give him life without possibility of parole, some new administration might occur in our penal system and he might either seek from the Governor a pardon, if you gave life without parole there may be a change in the parole laws by the legislature or the Governor might commute it. Now, would you be willing to consider those things if you are convinced of the defendant's guilt or any one or more of the five counts of kidnapping for the purpose of robbery? Will you consider those possibilities that he would again be free under any one of those three possibilities if you gave him life imprisonment without the possibility of parole as compared to the death penalty? Would you all be willing to do that?" [R. Folder 1, R. T. Vol. I, pp. 119-120.]

3. Further the prosecutor in questioning the jurors, said:

"Mr. Leavy: To put it another way, I never found any one to advance any argument to me that the death penalty was anything but a penalty of finality as compared to the possibilities of either life imprisonment or life imprisonment without the possibility of parole because even for murder in this State if a man gets life imprisonment or if there was no bodily injury to the kidnapping counts which would give life imprisonment under our indeterminate sentence law a person goes to prison for life not only can there be commutation, a pardon, or a change in the parole laws, but he is as a matter of law eligible at the end of seven calendar years for parole, and I assume you will take all of those things into consideration. I am sure these are things you never knew before when you were brought here as jurors." [R. Folder 1, R. T. Vol. I, p. 120.]

4. Further on, the prosecutor said to the jury in questioning them on *voir dire:*

"Mr. Leavy: Well, we will compromise. We will make a deal among ourselves. We will fix the death on this one or two of these we will fix life without parole; a sort of a variety form of verdict yet you are all convinced the proper penalty was the penalty of death; would any of you do that sort of thing, because from our side of the case we are entitled to not have you approach your verdicts in that manner because it is not the proper way. None of you would do that sort of thing.

"In other words, regardless of whether one count shows the victim was moved five feet and the other 15 and the other 20 or 25, you wouldn't say, 'Well, these 5-foot cases, we will make those life without parole although the offenses are just as aggravated but they weren't moved as far as this 25-foot one and this 20-foot one, we will make that the death penalty. None of you would do that because, to keep in mind what I have mentioned before, it is the fact of movement rather than the distance which makes the offense one, along with bodily harm, where the evidence shows kidnapping for the purpose of robbery, makes it subject to a possible capital penalty.

"Now, I may come back to this subject but I am going on to some other things. I think I have made it clear that I am not going through any formality here, I am doing it because I know what the evidence is and what I would expect consistent with the proper administration of justice in this case a jury to do, and if at any time I am questioning you on these other subject matters you change your mind I hope you will, as Mr. Hoppes has done, let us know so that I can question you." [R. Folder I, R. T. Vol. I, pp. 121-122.]

ARGUMENT TO THE JURY.

5. The prosecutor at the inception of his argument stated:

> "Mr. Leavy: So, at any time during the argument here I want you to understand that whenever I state that in my opinion thus and so, the evidence shows this or that, I want you to understand it is my opinion as the Deputy District Attorney in this case wherein I appear here on behalf of the District Attorney as one of his deputies." [R. Folder II, R. T. Vol. VII, p. 1169.]

Further, in the argument, the prosecutor said:

> "Mr. Leavy: I have charged certain crimes: I could have charged others, such as, in all of these cases where the defendant used a knife, the manner in which he used it would constitute an assault with a deadly weapon upon those persons, even Mrs. Casady wherein there is only one charge of simple kidnapping, but I have not charged those things because to me it would just encumber your duties here, the record and everything else." [R. Folder II, R. T. Vol. VII, p. 1170.]

The prosecutor later said:

> "Mr. Leavy: . . . as I have told you, I could have charged other offenses because every time this man went into a house with the intent and purpose to commit any one of those felonies with which he is here charged he committed the offense of first degree burglary, although to me that is extraneous here." [R. Folder II, R. T. Vol. VII, p. 1177.]

Further, the prosecutor said:

> "Mr. Leavy: You folks sat here on voir dire and you listened to me. I could not give you the

evidence; we were not allowed." [R. T. p. 1178]
"I knew what the evidence would be with the exception of one matter which I will argue later which I learned a week ago . . . ." [R. Folder II, R. T. Vol. VII, p. 1178.]

6. Later, the prosecutor said:

"Mr. Leavy: . . . I have done many times in these courts, I could lay the foundation to show he was lying and not just with Mrs. Tierstein's identification, and she is not even certain, as the other witnesses are, that it is he, but with that handwriting, that fatal mistake he made on the day he came back hoping to strike and mistreat Mrs. Tierstein as he has mistreated these other women, hoping to strike, but through his intuition for some reason he did not strike, and fortunately for him, but unfortunately for the administration of justice he did not because if he had Mr. Tierstein, Dr. Tierstein *would have been home and Wein would have been a coroner's case and perhaps we would not have to be here.*" [R. Folder II, R. T. Vol. VII, pp. 1179-1180, emphasis ours.]

The prosecutor further said:

"So each and every one of those counts is established beyond any doubt under those facts, and although some of you many have not believed that Mrs. Manning's identification was correct, keep in mind, forgetting the identity of the defendant, when Mrs. Manning testifies to those facts she establishes under the law what we call the corpus delicti of each of those four crimes charged wherein she is involved. The corpus delicti, the conception of that in the pulp's is—I think it means the body in a homicide case; but it does not, folks. It is nice copy and

makes good reading. They say, 'They haven't got the corpus delicti,' they have to discover the body like in the L. Ewing Scott case. A lot of people think the body of Mrs. L. Ewing Scott is the corpus delicti. Well, it is not the corpus delicti. The corpus delicti of murder in any crimes means under the law proof of the essential elements constituting the offense, such as kidnapping means movement against the will and without the consent, regardless of the distance." [R. Folder II, R. T. Vol. VII, pp. 1185-1186.]

7. Subsequently in his argument, the prosecutor, referring to treatment of one of the woman, said:

"Mr. Leavy: If that is not treatment which earns this defendant the extreme penalty of death, I never saw any. There is not a red blooded man on this jury, there isn't a respectable woman on this jury who in my opinion would say otherwise. That is why you were empaneled in this case for the purpose, as I said, you would be expected to perform consistent with the proper administration of justice." [R. Folder II, R. T. Vol. VII, p. 1201.]

8. Later on in his argument the prosecutor, referring to one of the complainants said:

"Mr. Leavy: What does Schock say when he sees the defendant in the jail—what does the defendant say? 'I don't want to say anything until I see my attorney,' which shows a consciousness of some kind, as we say in this work, an admission of guilt—but it is there just like it is with Mrs. Casady when she saw him at the station and she said, 'Well, I'm glad they got you, kid.' He made no reply.

"These are what we call admissions against interest, consciousness of guilt, actions and conduct

show consciousness of guilt . . ." [R. Folder II. R. T. Vol. VII, p. 1204.]*

Next the prosecutor said:

"Mr. Leavy: I have never in my life heard women in a behavior pattern such as this subjected to the treatment with these respectable women, going about their own business, attempting to either rent a place or to dispose of some property which they had advertised—I have never seen mistreatment of women like this in my lifetime, and I have seen plenty in these courts in almost 25 years." [R. Folder II, R. T. Vol. VII, p. 1231.]

Further, the prosecutor said:

"Mr. Leavy: But I knew they would present some such evidence of that kind, and I knew it was weak when I was cross examining all those witnesses, and it did not make any difference to me what kind of alibi they presented. I knew that Tierstein evidence and that check would dispel any credibility of any alibi they attempted to present concerning any count or any victim in this examination, as I understand and evaluate evidence in the trial of these cases, and I don't try to fool myself one way or the other; I can see the other side of the case just as well as I can my own . . . . I like to come here and lay it out cold. I like to lay it out just as cold as I laid out my voir dire examination with you, and I looked every one of you in the eye and told you we meant business here, this is not child's play. I told you what you would be faced with some several weeks hence.

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*We have discussed this fully in Point VI, showing the unwarranted prejudicial nature of this. [R. Folder III, Appendix, Vol. IV, pp. 279-297.]

and what would be expected of you as good citizens of this community. I don't double talk to jurors; I never will. I come in here and I lay it out cold. That is one good thing about prosecuting, trying lawsuits from this end of the table." [R. Folder II, R. T. Vol. VII, pp. 1234-1235.]

Further on, the prosecutor said:

"Mr. Leavy: So I say I knew I could dispel any of the so-called alibis they might produce. They did not bother me, the so-called alibis." [R. Folder II, R. T. Vol. VII, p. 1238.]

9. Next the prosecutor said:

"Mr. Leavy: It proves he is the man that did it because he sits here with ice water in his veins, ice water, when I brought Mrs. Tierstein up to him; and that is the behavior pattern of a man, the strange breed, as I have told you, of kidnappers, robbers and forcible rapists. They are cold, they are cruel."

"Why, this fellow puts Caryl Chessman to shame. He makes a rank amateur out of Caryl Chessman. Caryl Chessman got out of the penitentiary in 1947 after having been paroled for the second time. He was paroled a year or so before, but he was paroled in December of '47; at some short time before, he, having stolen a car, escaped from prison and committed a number of robberies." [R. Folder II, R. T. Vol. VII, p. 1329; emphasis ours.]

At this time an objection was made:

"Mr. Eagan: Pardon me, Mr. Leavy, I dislike to interrupt counsel. I would like to object to the remarks of counsel regarding the Chessman case, cite it as prejudicial misconduct. I ask the jury be instructed to disregard it.

"Mr. Leavy: I have a right under the Kyne case to call on my experience. I wish to demonstrate from my experience.

"The Court: Go ahead.

"Mr. Leavy: Chessman was an easy man to catch compared to this fellow. Chessman was paroled in December of '47. He stole a car January 3rd of '48, and by means of red cellophane paper made it look like a red spotlight, came up to lovers lane couples that might be spooning. Thinking he was a detective, before they knew it they found themselves in the hands of Chessman.

"But the police had a chance to catch the man because he was working on the streets with a car and by January 23rd the Hollywood Division again —those men are gone; these fellows were not there then; those men are gone—two rookie officers in a chase 80 miles an hour down Vermont Avenue in a running gun fight captured Chessman; they had had a chance.

"Here is a fellow answering ads, something the police have difficulty detecting. They have to wait until he strikes; they cannot look for a car of a certain description on the streets.

"Chessman, too, had ice water in his veins." [R. Folder II, R. T. Vol. VII, pp. 1329-1330.]

10. Continuing, the prosecutor said:

"That little girl, Karen Louise Stokes—yes, he is right—she will carry a mark on her forever. She *may end up the same way Mary Alice Meza, the 17 year-old virgin, the victim of the Chessman attack in a mental institution unless she has a strong mind and can in some way through her religious thinking beat it.*" [R. Folder II, R. T. Vol. VII, pp. 1330-1331; emphasis ours.]

11. The prosecutor continued [R. Folder II, R. T. Vol. VII, pp. 1331-1333]:

"Yes, that is why I say kidnapping for the purpose of robbery with bodily harm in situations such as this case, when you have a behavior pattern of a cold, cruel individual with ice water in the veins, that is why I say it calls for capital punishment, folks. You probably know, Mr. Allen* and you other fellows that had any connection with the Service, they give capital punishment for forcible rape, you don't have to kidnap and rob. It is one of the possible penalties. Many of our States also call for capital punishment for forcible rape, not kidnapping for the purpose of robbery with bodily harm, and here the forcible rapes and the sexual attacks are the bodily harm along with the others in some of these instances. The Army Services, believe you me, they know it is a proper penalty in certain cases.

"I have always felt, and I don't mean boy friend and girl friend situations where a fellow pushes the issue too far and is romancing a girl and maybe forces her or maybe she says no and she means yes, and technically it would be a forcible rape—I don't mean those situations; but I have always felt that certain forcible rape cases should carry the death penalty just as they do in other States. When you get these fellows that pull women off of streets, young girls, when you get these fellows that will go into a house and answer ads wherever they are, burglars, and forcibly mistreat women such as the evidence in this case shows, I say capital punishment is proper. And I know from experience that this business of life imprisonment for murder or life imprisonment without the possibility of parole, that

*Mr. Allen was one of the trial jurors.

is what the statute says, but that is not what it means. *One man was convicted of an offense of one of the very same offenses Caryl Chessman committed Knowles. He was convicted by a judge who gave him life imprisonment without possibility of parole that was in 1948. In 1951 the legislature changed Section 209 of the Penal Code and made those felonies eligible for parole. That is why I say the penalty of death is the penality of finality. Some persons earn it. When they earn it, I think they should receive it.*

"Life imprisonment without the possiblity of parole, and you have the right to consider these possibilities of both capital punishment and life without parole when you are determining the penalty in this case on these five counts where it is involved, *life imprisonment without the possibility of parole, yes, that is what the statute says, but it can be changed, there can be a pardon by the Governor. The Governor at any time can commute the sentence of that individual. Oh, I don't say it would be done now or next year, but 10 or 15 years from now I will be a has-been; there will be another Governor; there will be another group of people in law enforcement, they will probably have forgotten all about the seriousness and the manner in which the women were attacked. Sure, you have people right up there in the legislature today attempting under certain circumstances to have a moratorium or abolish capital punishment. I bet it will never get by the Senate.*" [R. Folder II, R. T. Vol. VII, pp. 1331-1333; emphasis ours.]

12. Next the prosecutor further on said:

"I believe, folks, at the recess I was attempting to point out to you that in this State the possible consequences of life imprisonment without the possibility of parole, that is what the statute says, that does not mean that a man that gets life imprisonment by sentence from a jury or the court necessarily would never be paroled because he could be pardoned by the Governor at some future time, that is a possibility, he could receive a commutation of sentence from the Governor, that is a possibility, or there could be a change in the parole laws, which is a possibility, as I have attempted to demonstrate to you a few minutes ago with respect to an individual by the name of Knowles." [R. Folder II, R. T. Vol. VII, p. 1334.]

13. Next the prosecutor said:

"I will say it is unfortunate they don't have capital punishment for rape itself as it occurred here without kidnapping and without the purpose of robbery; until they do we will abide by this statute. If there is kidnapping for the purpose of robbery and there is bodily harm and rape, I feel you will follow the law, as you told me you would, even though it is not murder, as I had your word, even though it is kidnapping for the purpose of robbery with bodily harm, and no one is killed, I had your word on that, folks, when you were empaneled here." [R. Folder II, R. T. Vol. VII, p. 1335.]

14. Further, the prosecutor said:

"Well, it is a case you will remember and I will remember, too, the many aggravated offenses, or offenses which are committed in an aggravated manner which I have seen tried in these courts in many years, some of which I have tried; there is not a single factor in this case that is not aggravating. There is not a thing to be said in favor of this defendant. If any one of you men, if you are red-blooded men, and if any of you women, if you are respectable women—and I believe every one of you is—can get into that jury room and find any fact or circumstance in this case that is not aggravated, I will put in with you. And to me that is one of the things that is a measuring stick of what the penalty should be in a case." [R. Folder II, R. T. Vol. VII, p. 1336.]

15. Next, the prosecutor said:

"Now, when you were empaneled here, folks, to get back to that matter, you were empaneled here, folks, I looked every one of you square in the eye. I did not try to fool any of you as to what you will now be faced with. I looked every one of you in the eye and I told you that I thought the evidence in this case consistent with the proper administration of justice would call for only one penalty and that would be the greater penalty of death. I did not try to hide anything. I gave every one of you an opportunity to get off this jury if you felt that you could not face the responsibility individually. Some several jurors did that. I just did not make reference to capital punishment and homicides.

made reference to just the very kind of case you have heard, capital punishment involved in a kidnapping for the purpose of robbery where no one is killed but it is with bodily harm, and there would be sexual attacks on women the likes of which I have never seen in my life. But I looked you all square in the eye, I felt you were all good people who would do your duty in this case, every one of you—you Mrs. Lang; you, Mr. Fleischman; you, Mrs. Granger; you, Mrs. Sanders; you, Mrs. LaGrille; you, Mrs. Reischauer; you, Mrs. Whiston; you, Mrs. Jensen; you, Mr. Allen; you, Mrs. Roesch; you, Mrs. Lawton—you hesitated a little bit but I had your word, you remember that, and you, Mrs. New; every one of you. I did not hold anything back, you could have gotten off this jury just as surely as other jurors asked to be excused, because although they were not opposed to capital punishment some of them they did not themselves want to anticipate the return of such a verdict, just as some Courts feel they rather have a jury pass upon it. But I have the word of every one of you that you would do your duty in this case and you could face the responsibility of coming down into this courtroom, after the exercise of a sound and absolute discretion based on all of the evidence in this case, which I say is the most aggravated of its kind I have ever heard, and come down in this courtroom and tell this defendant by your verdict under the law of the State of California he is condemned to death, and I urge you in this case to do your duty." [R. Folder II, R. T. Vol. VII, pp. 1337-1339.]

16. Further on, the prosecutor said in his closing remarks:

"Mr. Leavy: *I have only one regret in arguing this case to you, and that is that under the law of this State, for the reason that the defendant did not announce as his purpose robbery at any time to Karen Stokes, that I cannot charge him with kidnapping for the purpose of robbery with bodily harm and ask you to return a sixth verdict of death. That is the only regret I have. To do that child what this man did to that child to me is beyond comprehension. I urge you to impose the proper penalties in this case, folks. I am finished.*" [R. Folder II, R. T. Vol. VII, p. 1340; emphasis ours.]

Respectfully submitted,

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